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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LEE S. LEICHTLING, D.D.S.,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS EIGHTH CIRCUIT

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The petitioner, Lee S. Leichtling, D.D.S., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on July 19, 1982.

QUESTION PRESENTED

Whether the affidavit in support of the search warrant for petitioner's residence submitted to the United States Magistrate contained sufficient facts to establish probable cause to believe that the petitioner was concealing cocaine therein.

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OPINION BELOW

The opinion of the Court of Appeals for the Eighth Circuit, not yet reported, appears in the Appendix hereto. The Federal Reporter citation, however, is 684 F.2d 553. No opinion was rendered by the District Court for the Eastern District of Missouri.

JURISDICTION

The judgment and opinion of the Court of Appeals for the Eighth Circuit was entered on July 19, 1982. A timely petition for rehearing with suggestions for rehearing en banc was denied on August 10, 1982, and this petition for certiorari was filed within sixty (60) days of that date. The Court's jurisdiction is invoked under Title 28 United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, RULES

United States Constitution, Amendment 4:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Rule 41, Federal Rules Of Criminal Procedure

(c)(1) Warrant Upon Affidavit

A warrant other than a warrant upon oral testimony under paragraph (2) of this subdivision shall issue only on an affidavit or affidavits sworn to before the federal magistrate or state judge and establishing the grounds for issuing the warrant. If the federal magistrate or state judge is satisfied that grounds for the application exist, he shall issue a warrant identifying the property or person to be seized and naming or describing the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part. Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally or may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made a part of the affidavit. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law therefore or to a person so authorized by the President of the United States. It shall command the officer to search, within a specified period of time not to exceed 10 days, the person or place named for the property or person specified. The warrant shall be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It shall designate a federal magistrate to whom it shall be returned.

Title 21, United States Code, Section 843(a)(3):

Set out in Appendix.

Title 21, United States Code, Section 841(a)(1):

Set out in Appendix.

STATEMENT OF THE CASE

On October 27, 1981, the petitioner, Lee S. Leichtling, D.D.S., was found guilty, pursuant to a jury verdict, on six (6) counts of obtaining a controlled substance by fraud, in violation of Title 21, United States Code, Section 843(a)(3), and one (1) count of possession of a controlled substance with the intent to distribute, in violation of Title 21, United States Code, Section 841(a)(1). The case was tried in the United States District Court for the Eastern District of Missouri, the Honorable James H. Meredith presiding. The petitioner was sentenced to imprisonment for a period of ten (10) years on Count VII; sentenced to imprisonment for a period of three (3) years on each of Counts I, II and III to run consecutively, but to run concurrently with the sentence imposed under Count VII; sentenced to imprisonment for a period of three (3) years on each of Counts IV, V and VI to run consecutively, but to run concurrently with the sentence imposed under Count VII. In addition, a three (3) year special parole term was imposed.

The United States Court of Appeals for the Eighth Circuit affirmed petitioner's conviction in a judgment and opinion issued July 19, 1982, and denied petitioner's timely petition for rehearing with suggestions for rehearing en banc on August 10, 1982.

On July 16, 1981, a Special Agent of the Drug Enforcement Administration (affiant) appeared before a United States Magistrate for the Eastern District of Missouri seeking a search warrant for petitioner's residence. The information presented to the Magistrate consisted solely of the affiant's sworn affidavit, a copy of which is included in the Appendix.

The affidavit stated that the affiant received information that two one-ounce bottles of pharmaceutical cocaine would be delivered to a pharmacy on May 27, 1981. On that date the affiant observed the petitioner exit the pharmacy carrying "what appeared to be two similar bottles in a plastic case," and, "enter a blue Mercedes automobile and **drive in the direction of the residence** which is the subject of this search warrant." (emphasis supplied).

The affiant further stated that he received information that another shipment of two one-ounce bottles of pharmaceutical cocaine was to be delivered to the same pharmacy on July 10, 1981. On that date, the petitioner was seen to receive two one-ounce bottles from the pharmacist and exit the pharmacy. Surveillance agents further "observed the subject Lee Leichtling to place a pharmacy bag inside a brown vinyl case which appeared to be identical to the case he used on May 22, 1981; thereafter, the subject Lee Leichtling entered a blue Mercedes automobile which is registered to him, and proceeded to **drive to the above-described residence.**" (emphasis supplied).

Based upon the information contained within the affidavit, the Magistrate determined that probable cause existed for the issuance of a search warrant, and on July 17, 1981 law enforcement officers executed a search of petitioner's residence. The search uncovered, among other items, bottles containing cocaine hydrochloride. All of the items seized in the search of petitioner's residence were admitted into evidence over counsel's timely objections.

ARGUMENT

The Fourth Amendment to the United States Constitution states that "no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized." Petitioner submits that he has standing to challenge the search and seizure in the instant case because his own Fourth Amendment rights were violated by an illegal intrusion into his residence in which he had a legitimate expectation of privacy. *United States* v. *Salvucci*, 448 U.S. 83, 100 S.Ct. 2547, 65 L.Ed.2d 619 (1980); *Rakas* v. *Illinois*, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

When seeking to obtain a search warrant for an individual's residence, government officials must adhere to strict constitutional guidelines and rules of procedure. Rule 41(c) of the Federal Rules of Criminal Procedure requires that a neutral and detached magistrate may issue a search warrant only upon a finding of probable cause. The finding of probable cause must be based upon information contained solely in the sworn affidavit and/or sworn recorded testimony presented to him. *Zurcher* v. *Stanford Daily News*, 436 U.S. 547, 558, 98 S.Ct. 1970, 1977, 56 L.Ed.2d 525 (1978). This "four corners" approach has been adopted by this Court and is widely recognized among the Circuits. *Aguilar* v. *Texas*, 378 U.S. 108, 109 n.1, 84 S.Ct. 1509, 1511 n.1, 12 L.Ed.2d 723 (1963); *United States* v. *Melvin*, 596 F.2d 492 (1st Cir.), cert. denied, 444 U.S. 837, 100 S.Ct. 73, 63 L.Ed.2d 48 (1979); *United States* v. *Anderson*, 453 F.2d 174, 177 (9th Cir. 1971); *United States* v. *Pinkerman*, 374 F.2d 988 (4th Cir. 1967); *United States* v. *Gillespie*, 368 F.2d 1 (8th Cir. 1966).

Probable cause exists if facts within the magistrate's knowledge and of which he had reasonably trustworthy information would warrant a man of reasonable caution in the belief that a crime was committed and that the evidence is at the place

to be searched. *Draper* v. *United States*, 358 U.S. 307, 313, 79 S.Ct. 329, 333, 3 L.Ed.2d 327 (1964); *United States* v. *Maestas*, 546 F.2d 1177, 1180 (5th Cir. 1977).

The Circuit Courts have thus attempted to balance the decisions of this Court against the dictates of the Fourth Amendment to establish a standard for the issuance of a warrant to search a residence. The Circuits are divided over the specificity of information which is needed to lay the foundation for the magistrate's finding. The differentiation primarily rests with the required nexus between the objects to be seized and the premises to be searched.

The Fifth Circuit requires the affidavit to reveal *factual observations* that the objects were at the defendant's residence. *United States* v. *Flanagan*, 423 F.2d 745, 747 (5th Cir. 1970). The *Flanagan* affidavit recited that a home was burglarized, that the stolen property remained unrecovered, that the defendant was a known felon, and that the defendant was arrested earlier in the day with some of the stolen property on his person. In holding the affidavit insufficient to support a finding of probable cause to search defendant's residence, the Court noted:

> "The affidavit contained nothing, either in the limited recital of the DA's personal knowledge (that Flanagan was a known felon) or communications from informants (factual or conclusory) that the missing goods were where the DA said they might be, other than the house was said to be Flanagan's residence." *Id.*, at 747.

Similarly, a recent decision from a District Court in the Seventh Circuit requires the affiant's direct observations of the object of the search entering a residence before probable cause is met to sustain the issuance of a search warrant. *United States* v. *Rambis*, 526 F.Supp. 866 (N.D. Ill. 1981).

This Court has also indicated that a direct link between the "contraband" and the inside of the residence to be searched is required. In *Spinelli* v. *United States*, 393 U.S. 410, 423, 89 S.Ct. 584, 27 L.Ed.2d 637 (1969), Justice White, concurring with the opinion of the Court, which held an affidavit insufficient, writes, "[A]n investigator's affidavit that he has seen gambling equipment being moved into a house at a specified address will support the issuance of a search warrant." Thus, where the affidavit states the affiant's or informer's personal observations of the items to be seized inside the residence, the Courts have had little difficulty validating the warrant. See *United States* v. *Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971) (an informant recited that while in the suspect house he observed and purchased illegal whiskey); *United States* v. *Fleming*, 566 F.2d 623 (8th Cir. 1977) (informant saw one-half pound of marijuana at defendant's residence and the defendant offered to sell the informant marijuana).

Courts have also upheld affidavits based upon the observations of the affiant while situated outside the premises to be searched. In *United States* v. *Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), this Court upheld an affidavit which stated that the affiant smelled the odor of fermentation eminating from the suspect house, heard metallic and pump noises from within, observed the defendant on four occasions unload sixty pound bags of sugar from his vehicle, and observed the vehicle being loaded with five gallon cans which were brought from the house. Clearly, the nexus between criminal activity and the residence to be searched was established.

Likewise, where the affidavit included information that the defendant received two orders of chemicals at a specified address which, when combined, could only produce methamphetamine, that the defendant made late night and Sunday entries into the structure, and that the defendant was observed to assemble lab equipment inside the address, a search warrant was properly issued. *United States* v. *Drake*, 673 F.2d 15 (1st Cir. 1982). See also, *United States* v. *Coppage*, 635 F.2d 683 (8th Cir. 1980).

Searches have been upheld where the affiant witnessed no activity inside, nor outside of the premises to be searched. *Anthony* v. *United States,* 667 F.2d 870 (10th Cir. 1981); *United States* v. *Brown,* 584 F.2d 252 (8th Cir. 1978); *United States* v. *Lucarz,* 430 F.2d 1051 (9th Cir. 1970). The Court in *Anthony, supra,* stated:

> "The situation here does not differ markedly from other cases wherein this court and others, albeit usually without discussion, have upheld searches although the nexus between the items to be seized and the place to be searched rested not on direct observation, as in the normal search-and-seizure case, but on the type of crime, the nature of the missing items, the extent of the suspect's opportunity for concealment, and normal inferences as to where a criminal would be likely to hide stolen property." *Id.,* at 874.

See also, *Grimaldi* v. *United States,* 606 F.2d 332 (1st Cir. 1980).

The case before the Court is a possessory offense of two one-ounce bottles. It is not the type of case where bulky apparatus is required for the manufacture of explosive devices, narcotics or illegal whiskey. In the latter cases, the very nature of the offense demands a fixed, sheltered situs from which to operate. The Courts have reasonably inferred, then, that the subject items of the search would be found at the location named in the affidavit.

No *Anthony, et al,* inference can be drawn from the facts in *Leichtling* to suggest that the two bottles were probably located inside petitioner's residence. Indeed, the most plausible hypothesis, given the facts within the affidavit, is that the bottles were located at petitioner's office, where cocaine-hydrochloride has an accepted dental use as a topical anesthetic. In addition, the opportunities for concealment of two one-ounce bottles are boundless. Petitioner submits that the *An-*

thony line of "reasonable inferences" cases is inopposite, and that direct factual observations are required in order to link the items sought and the place to be searched.

Even in the Courts which do not require direct observation of criminal activity, there still exists the fundamental requirement that the affidavit allege sufficient facts to warrant a reasonable person to believe that the objects sought would be found in the place described. Where an affidavit recited that the defendant purchased explosives, that he threatened a former employer and alluded to explosives in the threat, that a bomb was found at the former employer's plant and that no proper storage facilities existed at defendant's residence, the Eleventh Circuit found the affidavit insufficient to support a finding of probable cause. *United States* v. *Lockett*, 674 F.2d 843, 846 (11th Cir. 1982).

The *Lockett* Court made clear that the nexus necessary between the objects to be seized and the premises to be searched must be clear-cut. In *Lockett*, the affidavit was held insufficient because there was a link missing "in the chain of facts and circumstances which would lead to a reasonable belief that dynamite was improperly stored at Lockett's Sweetwater address." *Id.*, at 846. The affidavit set forth no facts from which the magistrate could infer that dynamite was located at that particular place. The Eleventh Circuit reasoned that:

> "[I]t is true that the nexus between the objects to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation. *United States* v. *Charest*, 602 F.2d 1015 (1st Cir. 1979). It is equally true that a search will be upheld if 'the facts described in the affidavits warrant a reasonable person to believe that the objects sought would be found.' *United States* v. *Green*, 634 F.2d 222, 225 (5th Cir. 1981). Nevertheless, there still must be a '*substantial basis*' to conclude that the instrumentalities of the crime will be discovered on the searched premises." *Aguilar* v. *Texas*, 378 U.S. at 111, 84 S.Ct. at 1512; *United States* v. *Melvin*, *supra*. *Id.*, at 846. (emphasis supplied).

The Eighth Circuit, in *United States* v. *Taylor*, 599 F.2d 832 (8th Cir. 1979), held that the magistrate must not use his imagination when making a probable cause determination. In *Taylor*, the affidavit was based upon, and the search warrant was issued solely on the conclusion that the instrumentalities were hidden inside the residence in question. The Court held that this unsupported conclusion was inadequate to allow the inference of probable cause:

> "Nowhere in the affidavit is it set forth that the surveilling officer saw Worley [a co-defendant] on any occasion enter the house at 1728 or exit the premises. Nowhere in the affidavit is it set forth that the surveilling officers observed the defendant on any occasion either entering or exiting said house... Therefore, at that point, it was a conclusion, based on a mere suspiciion of the surveilling agents, that the house in question contained the firearms. Consequently, the official who issued the warrant relied on the same conclusion." *Id.*, at 836.

The *Taylor* Court subsequently held the search warrant invalid because the magistrate "[could not] rely on facts...which raise a mere suspicion or conclusion which he equates to be a proper finding of probable cause." *Id.*, at 836. See also, *United States* v. *Schmidt*, 662 F.2d 498, 505 n.9 (8th Cir. 1981).

Recently, the Second Circuit found that the "substantial basis" test was satisfied. In *United States* v. *Jackstadt*, 617 F.2d 12 (2nd Cir. 1980), the affidavit revealed the following allegations: that large purchases of petroleum ether (used to extract hashish oil from marijuana) had been made by the defendants using false names; that there were links between one of the defendants and the manufacture of hashish oil; that the transporting automobile was parked at the residence after being followed from the chemical company; and that a defendant was observed removing a five-gallon can of petroleum ether from

the rear of the vehicle. Although the affidavit did not recite that the defendant carried the can into the residence, the Court upheld the search, reasoning:

> "[I]t would be surprising indeed if Jackstadt had purchased petroleum ether, driven it to his home, removed a five-gallon can from his car and then strolled with it down the street. The inference that Jackstadt carried the ether into the house was plainly a reasonable one in the circumstances of the case." *Id.*, at 14.

In comparing the affidavits in *Jackstadt* and the case before the Court, a crucial distinction is apparent. The petitioner concurs that the *Jackstadt* Court was reasonable in its inference that the defendant would not "stroll" with the five-gallon can, but would likely enter his residence. In *Leichtling*, however, the affidavit states that on one occasion the petitioner "drove in the direction of" his residence, and on another occasion "drove to his residence." On the first occasion, the affidavit does not even place the petitioner at or near the premises to be searched. On neither occasion does the affidavit allege that the petitioner entered or approached his residence, removed cocaine hydrochloride from the vehicle, nor even that the petitioner exited his vehicle. While the affidavit may allege sufficient facts to justify a search of the person or vehicle, *United States* v. *Solario*, 577 F.2d 554 (9th Cir. 1978), the *Leichtling* affidavit lacked the requisite "substantial basis" to conclude that the items would be found in petitioner's residence.

In addressing this issue, the Eighth Circuit Court of Appeals overcame these obstacles by holding:

> "[W]e think the recitation in the affidavit that Dr. Leichtling was observed to drive 'to' his residence raises a reasonable inference that he actually entered his residence, because we can think of few situations where a person would drive to his residence without entering it." *Leichtling* opinion, at 6.

Petitioner submits that the Eighth Circuit overlooked the essential requirement in determining the sufficiency of an affidavit, i.e., the nexus necessary between the item to be sought and the place to be searched. Assuming arguendo, that a magistrate may infer that a person driving "to" his residence will enter it, the Eighth Circuit must then make the second assumption, without any basis, that the Petitioner carried cocaine into his residence with him.

This Court must not condone the Eighth Circuit's "inference upon inference" approach in determining the sufficiency of an affidavit. Absent in the Eighth Circuit's opinion is the justification for the second inference. The Court only addresses the issue of inferring that the petitioner entered his residence. In so doing, the Eighth Circuit has taken a quantum leap from the "reasonable inferences" - "substantial basis" approaches permitted by the other Circuits, and has authorized magistrates to use speculation and conjecture to fill in the missing links in a defective affidavit.

Not to be forgotten is the Court's admonition that "[T]he proceeding by search warrant is a drastic one, and must be carefully circumscribed so as to prevent unauthorized invasions of the 'sanctity of a man's home and the privacies of life.' " *Berger* v. *New York*, 388 U.S. 41, 58, 87 S.Ct. 1873, 18 L.Ed.2d 1040 (1967), citing, *Boyd* v. *United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886).

Petitioner contends that the Eighth Circuit's opinion in *Leichtling* is in conflict with every Circuit, especially the Fifth and Eleventh, which has addressed the sufficiency of an affidavit to support the search of a residence. The issues presented herein are ripe for review by this Court, not only to prevent Rule 41(c) from becoming a "rubber-stamp" procedure, but also to provide guidance to all the courts of the country in this crucial Fourth Amendment question.

Respectfully submitted,

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